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No. 85-1380

In the Supreme Court of the United States

OCTOBER TERM, 1985

MELBA JOSEPHINE ARNOUX WOODHOUSE, PETITIONER

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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Petitioner, an Indian allottee, brought this action to establish title to mineral rights that allegedly are appurtenant to her allotment. She contends that the court of appeals erred in holding that her suit is barred (1) as against the United States by the six-year statute of limitations in 28 U.S.C. 2401(a), and (2) as against the Blackfeet Tribe of Indians by the immunity of the Tribe from suit.

1. a. Petitioner is an enrolled member of the Blackfeet Tribe who was born in 1912 and was granted an allotment in 1922. The procedures for allotment of reservation land to individual Indians were established by the General Allotment Act of 1887, 25 U.S.C. (& Supp. II) 331 *et seq.* Section 2 of that Act, 25 U.S.C. (Supp. II) 332, provides for the selection of allotments "by the Indians, heads of families select[ing] for their minor children, and the agents * * * selecting for each orphan child." Section 2 further provides (emphasis added):

> That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior *may direct* the agent of such tribe or band * * * to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

By the Act of March 1, 1907, ch. 2285, 34 Stat. 1015 *et seq.*, the Commissioner of Indian Affairs was authorized to cause allotments of land on the Blackfeet Indian Reservation to be made "under the provisions of the allotment laws of the United States" (34 Stat. 1035). Thereafter, but prior to petitioner's selection of an allotment in 1922, Congress passed the Act of June 30, 1919, ch. 4, 41 Stat. 3 *et seq.*, which provides in relevant part (§ 10, 41 Stat. 16-17):

> [T]he Secretary of the Interior is authorized to make allotments under existing laws within the [Blackfeet] reservation to any Indians of said Blackfeet Tribe not heretofore allotted, * * * *provided* * * *, [t]hat any and all minerals, including coal, oil, and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly * * *.

Because petitioner's allotment selection was made after June 30, 1919, the patent she received reserved the mineral rights to the Tribe (Pet. App. 2a).

b. In 1983, petitioner filed this action against the federal respondents and the Tribe seeking: (1) a declaration of her ownership ab initio of the mineral rights in and under her allotment, and (2) either payment to her of all revenues received by the Tribe from the mineral interests, or an award of damages against the United States for the value of

the mineral interests. Petitioner asserted a right of action under 25 U.S.C. 345, which provides that any persons of Indian descent "who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress" may commence an action against the United States in the proper district court. The district court held that it had jurisdiction under 25 U.S.C. 345 and the parallel jurisdictional provision in 28 U.S.C. 1353, but it dismissed the amended complaint for failure to state a claim upon which relief could be granted. Pet. App. 10a, 13a-14a. In the district court's view, although the Secretary was *empowered* to have caused an allotment to be selected for petitioner prior to the enactment of the 1919 statute that reserved the mineral rights to the Tribe, he was not required to do so.

c. The court of appeals affirmed on other grounds (Pet. App. 1a-7a). Following its prior decision in *Christensen* v. *United States,* 755 F.2d 705 (9th Cir. 1985), petition for cert. pending, No. 85-372, the court of appeals held that the district court had no jurisdiction over this suit insofar as it was brought against the United States because the suit is barred by the statute of limitations in 28 U.S.C. 2401(a) (Pet. App. 4a-6a). Section 2401(a) provides (with one exception not relevant here) that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The court held that this bar applies to a suit brought by an Indian under 25 U.S.C. 345, observing that it had twice previously rejected the argument that the United States may not invoke a statute of limitations against an Indian because of the special trust relationship between the government and the Indians. See Pet. App. 5a, citing *Christensen* v. *United States,* 755 F.2d at 707-708, and *Mann* v. *United States,* 399 F.2d 672, 673 (9th Cir. 1968).

The court of appeals further held that the district court had no jurisdiction over this suit insofar as it was brought against the Tribe, because of the Tribe's sovereign immunity. Pet. App. 6a-7a. The court explained that neither Congress nor the Tribe had waived the Tribe's immunity from suit (*id.* at 6a) and that 25 U.S.C. 345 cannot be read as an implied waiver of tribal immunity, since such waivers must be unequivocally expressed (Pet. App. 6a-7a, citing *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 58-59 (1978)).

2. a. Petitioner first argues (Pet. 5-14) that the six-year statute of limitations in 28 U.S.C. 2401(a) does not apply to a suit brought by an Indian against the United States under 25 U.S.C. 345. That question also is involved in *United States* v. *Mottaz,* cert. granted, No. 85-546 (Nov. 18, 1985). We therefore suggest that the petition for a writ of certiorari in this case be held and disposed of as appropriate in light of the Court's decision in *Mottaz.*[1] We have suggested a similar course in *Christensen* v. *United States,* petition for cert. pending, No. 85-372, which presents the same statute of limitations issue.

b. Petitioner also argues (Pet. 14) that the court of appeals erred in holding that this suit is barred by sovereign immunity insofar as it is brought against the Tribe. The only argument petitioner advances for avoiding the doctrine of sovereign immunity is that 25 U.S.C. 345 should be construed as an implied waiver of tribal immunity. However, as the court of appeals recognized, this Court has held that a waiver of a tribe's sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. at 58-59. Review of this issue is not warranted in this case.

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[1]We have furnished counsel for petitioner with a copy of our brief in *Mottaz.*

It is therefore respectfully submitted that (i) with respect to the first question presented, the petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *United States* v. *Mottaz,* cert. granted, No. 85-546 (Nov. 18, 1985); and (ii) with respect to the second question presented, the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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